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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 97

UNITED STATES OF AMERICA, PETITIONER,

vs.

R. F. BALL CONSTRUCTION COMPANY, INC., AND UNITED PACIFIC INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for certiorari filed April 4, 1957.

Certiorari granted May 13, 1957

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UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 1997

R. F. BALL CONSTRUCTION COMPANY, INC.,
Plaintiff,

vs.

MARCUS M. JACOBS AND HENRY LESKY, d/b/a MARCUS M. JACOBS CO., *et al.*,
Defendants.

Stipulation of Facts—Filed January 11, 1955

Solely for the purposes of this action, the undersigned parties hereby stipulate the following facts:

1. On June 26, 1951, R. F. Ball Construction Company, Inc. entered into a contract with the Housing Authority of the City of San Antonio, Texas for the construction of housing project TEX 6-10.

2. The Housing Authority of the City of San Antonio is an organization existing by virtue of Article 1269 (K), Texas R.C.S. (1925), as amended.

3. On July 17, 1951, R. F. Ball Construction Company, Inc. subcontracted the painting and decorating, taping and floating of sheetrock and waterproofing of masonry units on housing project TEX 6-10 to Marcus M. Jacobs and Henry Lesky, d/b/a Marcus M. Jacobs Company, 811 Capitol Avenue, Houston, Texas. As a part of the subcontract, Marcus M. Jacobs and Henry Lesky, d/b/a Marcus M. Jacobs Company agreed:

> • • • to furnish and pay for all labor, material, tools, equipment, compensation insurance and public liability and property damage insurance (carried in responsible companies and in limits satisfactory to R. F. Ball Construction Company, Inc.), also keep records and make payments on all Federal and/or State Payroll Taxes and/or deductions, together with all other incidentals necessary to complete in a good and workmanlike manner (the subcontracted work) • • •

4. On July 23, 1951, Marcus M. Jacobs and Henry Lesky, d/b/a Marcus M. Jacobs Company (as principals) and United Pacific Insurance Company (as surety) executed a bond in the amount of $229,029, with R. F. Ball Construction Company, Inc. as obligee, conditioned upon the faithful performance by the principals of the subcontract with respect to housing project TEX 6-10 (and also housing project TEX 6-7, not here material) "• • • according to its terms, covenants, and conditions • • •."

5. According to the terms of the subcontract, the subcontract price of $137,906 was payable in monthly installments of 90% of the value of the work completed, leaving a balance of 10% of the value of the completed work at all times unpaid, which balance was to be paid to Jacobs and Lesky upon the acceptance of the work of R. F. Ball Construction Company, Inc. by the Housing Authority of the City of San Antonio, Texas.

6. On October 1, 1951, the business of Marcus M. Jacobs and Henry Lesky, d/b/a Marcus M. Jacobs Company was incorporated under the name Marcus Jacobs Co., Inc. and the corporation succeeded to all rights of the partnership, in said contract by virtue of an assignment duly executed on said date.

7. On April 30, 1953, the Housing Authority of the City of San Antonio, Texas accepted the work of R. F. Ball Construction Company, Inc. and, thereafter, on October 8, 1953, since Marcus Jacobs Co., Inc. had performed the work required by the subcontract, it was agreed by the R. F. Ball Construction Company, Inc. and Marcus Jacobs Co., Inc. that the sum of $13,228.55 (representing retained percentages according to the terms of the subcontract) be-

came due and owing to Marcus Jacobs Co., Inc. as of April 30, 1953.

8. The following table sets forth the pertinent information with respect to the federal tax liabilities of Marcus Jacobs Co., Inc.:

Kind of Tax	Taxable Period	Date Assessment List Received By District Director	Date of Notice and Demand
W-H	4 Q. '52	3-16-53	3-19-53
FUTA	1952	5-14-53	5-18-53
FICA	1 Q. '53	5-15-53	5-15-53

Date Notice of Tax Liens Filed Harris Cty.	Amount Assessed	Outstanding Balance
6- 9-53	$11,174.53	$ 6,343.24
9- 5-53	1,012.47	1,012.47
5-18-53	9,655.14	9,655.14
	$21,842.14	$17,010.85

The parties make no stipulation as to whether or not these taxes arose in connection with the performance of the subcontract referred to in paragraph 3.

9. Herweck Co., Inc. furnished paint and other materials to Marcus Jacobs Co., Inc. in connection with the performance of the subcontract, as a result of which it has claim against Marcus Jacobs Co., Inc. for $981.83. Herweck Co., Inc. notified United Pacific Insurance Company, the Housing Authority of the City of San Antonio, Texas, and R. F. Ball Construction Company, Inc. of its claim on July 13, 1953. No stipulation is made as to the adequacy of any notices of claim to hold United Pacific Insurance Company liable on its bond.

10. S. H. Kottwitz, d/b/a S. H. Kottwitz & Company, furnished compensation and public liability insurance to Marcus Jacobs Co., Inc., as a result of which he has a claim against Marcus Jacobs Co., Inc. for $2,431.05 for insurance premiums due on November 1, 1952. S. H. Kottwitz notified R. F. Ball Construction Company, Inc. and

United Pacific Insurance Company of his claim on September 18, 1953.

11. This case originated in the State District Court of Bexar County, plaintiff therein filing a suit in the nature of a Bill of Interpleader, and tendering into court the $13,228.55. The allegations of plaintiff's petition with reference to the dispute over such fund and with reference to its inability to make payment thereof without subjecting itself to possible double liability, are true. Plaintiff asks allowance of interpleader fee and its court costs, to be payable out of the $13,228.55. It is stipulated that a reasonable fee for the services performed by Simon & Simon, attorneys for R. F. Ball Construction Co., Inc. (the interpleader) is $500; provided a fee may be allowed by the Court to the interpleader's attorneys out of the $13,228.55 in question, under applicable principles of law.

(s) RICHARD W. SIMON
For R. F. Ball Construction Company, Inc.

(s) JOSH H. GROCE
For United Pacific Insurance Company

(s) PATRICK H. SWEARINGEN, JR.
For The Herweck Co., Inc.

(s) ALLEN H. KOTTWITZ
For S. H. Kottwitz & Company

(s) C. H. HERRING
United States Attorney

Dated: 1-11-55.

Filed: 1-11-55.

IN UNITED STATES DISTRICT COURT

Stipulation of Facts—Filed January 17, 1955

Solely for the purpose of this action, the undersigned parties hereby stipulate to the following facts:

That on the 21st day of July, 1951, Marcus M. Jacobs and Henry Lesky, d/b/a Marcus M. Jacobs Company, applied to United Pacific Insurance Company for a faithful performance bond payable to R. F. Ball Construction Com-

pany in the penal sum of $229,029.00, which bond was thereafter duly executed by said company. In the application for said bond it was provided in part as follows:

> "the undersigned does by these presents assign, transfer and convey to United Pacific Insurance Company, the Company, as of this date, as collateral security for the full performance of the covenants and agreements herein contained and the payment of any other indebtedness or liability of the undersigned to the Company, whether heretofore or hereafter incurred the following:
>
> • • • • • • • •
>
> "(d) All right, title and interest of the undersigned in and to and all percentages retained by the Obligee under said contract, and any and all estimates, payments extra, final payments, and other sums that .... may be due or may thereafter become due under said contract to or on behalf of the undersigned."

That said application likewise contained the following provision:

> "The agreements and covenants herein contained shall be binding upon the undersigned, both jointly and severally, and upon their heirs, personal representatives, successors and assigns of each, jointly and severally. ..."

That, as has been previously stipulated on October 1, 1951, the business of Marcus M. Jacobs and Henry Lesky, d/b/a Marcus M. Jacobs Company, was incorporated under the name of Marcus M. Jacobs Company, Inc. and the Corporation succeeded to all rights and liabilities of the partnership in said contract by virtue of an assignment duly executed on said date.

Thereafter, said Marcus M. Jacobs Company, Inc. applied to United Pacific Insurance Company for a bond payable to Darby Construction Company and the Perkins Construction Company in the sum of $35,591.00 covering a sub-contract in Louisville, Kentucky, which bond was duly executed by said Company. That in the application for said bond, dated April 4, 1952, the said Marcus M. Jacobs Company, Inc., agreed "to indemnify and keep indemnified,"

the Company against all loss, costs, damages, expenses and attorneys' fees whatever".

Thereafter, between December of 1953 and March of 1954, by virtue of its obligations under said bond said United Pacific Insurance Company was required to make payments as follows:

Kelley-Mahone Company	$ 4,569.17
Derby Construction Co., Inc. and the Perkins Construction Co. and B. L. Shamburger	7,000.00
John M. Hennessy, Clerk	14.45
Edward H. Marcus Paint Co.	37.46
Fulbright, Crooker, Freeman & Bates, Attys	398.12
Boehl, Stopher, Kilgarrif, Graves & Deindoerfer, Attorneys	952.68
Total	$12,971.88

Dated:

UNITED PACIFIC INSURANCE COMPANY
(s) JOSH H. GROCE
United States Attorney
(s) CHARLES F. HERRING

Filed: January 17, 1955.

IN UNITED STATES DISTRICT COURT

Memorandum Opinion—February 6, 1956

The Court, having considered the pleadings, the stipulated facts, and the briefs and oral arguments of the parties in the above cause, finds the facts and the law to be in favor of R. F. Ball Construction Company, Inc., and United Pacific Insurance Company.

The Clerk will advise counsel for all parties of the opinion of the Court and request counsel for United Pacific Insurance Company to prepare and submit to the Court tentative findings of facts and conclusions of law and judgment, and furnish copies thereof to cousel for all other parties.

(s) BEN H. RICE, JR.
United States District Judge

February 6, 1956.
Filed: February 7, 1956.

IN UNITED STATES DISTRICT COURT

Memorandum of Decision—April 17, 1956

Pursuant to Rule 52(a) this Memorandum of Decision is filed and contains findings of fact and conclusions of law in this case, the facts of which have all been stipulated by the parties.

On June 26, 1951, R. F. Ball Construction Company (hereinafter called Ball) entered into a contract with the Housing Authority of the City of San Antonio (hereinafter called Housing Authority) for the construction of a housing project. Shortly thereafter Ball subcontracted the painting and decorating involved in such contract to Marcus M. Jacobs Company, a co-partnership consisting of Marcus Jacobs and Henry Leskey (hereinafter called Jacobs) for the sum of approximately $230,000.00 and required of it a faithful performance bond. On July 21, 1951, Jacobs applied to United Pacific Insurance Company (hereinafter called Bonding Company) for such performance bond, and one of the considerations agreed to in the application for such bond was an unconditional assignment by Jacobs to the Bonding Company of all percentages retained by Ball under the Jacobs sub-contract as collateral security for the protection of the Bonding Company, not only for losses growing out of the Housing job, but for the "payment of any other indebtedness or liability" of Jacobs to the Bonding Company, "whether heretofore or hereafter incurred". A few months thereafter the business of Jacobs was incorporated into Marcus M. Jacobs Company, Inc. (hereinafter called Jacobs, Inc.) and the corporation succeeded to all rights and liabilities of the partnership. No party to this controversy has raised any question about the succession, so this mutation from the partnership to the corporation is immaterial and will not be referred to further. See *Mites* v. *Aetna*, 1 F. Supp. 925; *Illinois Surety Co.* v. *Davis*, 244 U.S. 376, 37 S.Ct. 614, 61 L.Ed. 1202.

Thereafter, on April 4, 1952, Jacobs, Inc. obtained from the Bonding Company a similar bond on another sub-contract in Louisville, Kentucky, in the application for which Jacobs, Inc. agreed "to indemnify and keep indemnified the company against all loss, costs, damages, expenses and attorney's fees whatsoever * * *", and under such bond the

Bonding Company exposed itself to a liability of some $35,000.00.

On April 30, 1953, the Housing Authority accepted the work of Ball and subsequently it was agreed between Ball and Jacobs, Inc. that the sum of $13,228.55 representing the retained percentages according to the terms of the subcontract, was due and owing on this job by Ball to Jacobs, Inc., as of April 30, 1953.

In May, June and September of 1953, and long after the assignment as collateral security of the retained percentages on the Housing Authority job had been made to the Bonding Company, and long after the Bonding Company had executed its obligation under its bond on the Louisville job, the United States Government filed tax liens against Jacobs, Inc. totalling $17,010.85. No stipulation is made by the parties that this tax claim arose out of Jacobs, Inc.'s failure to pay taxes incurred on either the Housing Authority job or the Louisville job, so that this court must assume that they are ordinary tax liens, not growing out of the particular jobs in question, and the Government here makes no claim on either of the bonds.

After the tax liens had been filed, the potential liability on the Kentucky job incurred by the Bonding Company on April 4, 1952, became an actual liability and the Bonding Company was required to pay, by virtue of its bond in connection with the Kentucky project, the sum of $12,971.88.

Thereafter, because of numerous conflicting claims presented to Ball, Ball was unable to determine with safety to itself to whom the $13,228.55 of retained percentages which it held in its hands should be paid. Therefore, Ball filed this suit, which is an interpleader action, making as parties defendant Jacobs and Jacobs, Inc., the Government, the bonding Company and certain suppliers of materials and services on the Housing Authority job, and asking for an interpleader's fee of $500.00, which has been stipulated to be a reasonable fee if under the law any interpleader's fee is payable. The Government filed its answer claiming the funds by virtue of its tax liens; the Bonding Company filed its answer claiming $12,971.88 of the funds by virtue of its assignment as collateral security and the loss which it sustained on the Kentucky job; the Herweck Company, Inc. filed its claim for $981.83 for materials

furnished on the Housing job; S. H. Kottwitz & Company filed its claim for compensation and public liability insurance premiums on said job of $2,431.05. Several other claimants were made parties defendant but failed to answer and make claim, and default judgment was rendered against them. Kottwitz, although filing a claim, has not appeared in any of the hearings, and has failed to file any briefs herein in support of his claim; and it appearing to the court that under decision such as *U.S.* v. *Yates*, 204 S.W.2d 399, as well as by virtue of default, Kottwitz is not entitled to recover, judgment will go against him.

The Herweck Company has filed its brief contending that it is entitled to priority, but has likewise stated that the Bonding Company had agreed to satisfy its claim if the Bonding Company prevailed herein, and has asked, therefore, that judgment go in favor of the Bonding Company, and in view of this Herweck likewise goes out of the case, under the court's rulings, since the court is of the opinion that the Bonding Company should prevail herein, and will respect the agreement between Herweck and the Bonding Company.

The principal question for determination by this court is as to which lien is prior—the Government's tax lien which arose by virtue of the filing of the notice of its tax liens in May, June and September of 1953, or the contract lien of the Bonding Company which arose long prior thereto by virtue of the assignment of the retained percentages in question by Jacobs to the Bonding Company, which by contract protected the Bonding Company from the loss which it incurred on the Louisville job, which became a potential loss upon the execution of the Louisville bond on April 4, 1952, prior to the filing of the Government's tax liens, but which was not paid under its bond until after the filing of the Government's tax liens.

The Government cites and contends that the case of *U.S.* v. *Security Trust & Savings Bank*, 340 U.S. 47, 71 S.Ct. 111; *U.S.* v. *Gilbert Associates*, 345 U.S. 361, 73 S.Ct. 701; *U.S.* v. *City of New Britain*, 347 U.S. 81, 74 S.Ct. 367; *U.S.* v. *Acri*, 348 U.S. 211, 75 S.Ct. 239; *U.S.* v. *Liverpool, etc. Ins. Co.*, 348 U.S. 215, 75 S.Ct. 247; and *U.S.* v. *Scovil*, 348 U.S. 218, 75 S.Ct. 244, are in point and are controlling in this case, and says:

"* * * the principles of United States v. Security Trust & Sav. Bk.; United States v. New Britain; United States v. Scovil; United States v. Acri; and United States v. Liverpool & London Ins. Co. supra, must be applied."

The Bonding Company, on the other hand, contends that none of the liens in the above cited cases were contractual liens and that none of those cases dealt with mortgagees, pledgees, or purchasers within the meaning of Section 3672 of the Internal Revenue Code (now Sec. 6323, Title 26 U.S.C.), and further contends that in those cases the court was construing only the term "judgment creditor" and liens other than mortgages and pledges, and therefore says that such cases are not controlling in this case.

Section 3672 of the Internal Revenue Code provides in effect that filing of a federal tax lien does not affect the rights of any prior "mortgagee, pledgee, purchaser or judgment creditor". Most of the decisions of the Supreme Court cited above and referred to by the Government dealt with inchoate judgment liens and none of those cases dealt with the contract lien of a "mortgagee", "pledgee" or "purchaser". The latter three categories are all based upon a contract right of some sort, whereas the term "judgment creditor" and the other liens dealt with in those cases, such as water rent liens, municipal tax liens and landlord's distress liens, arose by virtue of some statutory right, not specifically referred to in Section 3672.

The Bonding Company contends that since its assignment as collateral security was based upon a contract which was prior in time to the Government's tax liens, it is either a mortgagee, pledgee or purchaser of the retained funds and it disclaims any contention on its part that it is a judgment creditor, or claims to be anything other than a mortgagee, pledgee or purchaser.

In the case of *National Refining Co.* v. *U.S.*, 106 F.2d 951, the taxpayer was indebted to National Refining Company, which took an assignment as collateral security from the taxpayer of certain commissions to be earned by him under his contract with the Government "when they should become available to him". Before any money had been earned or paid under this assignment, the Government perfected a tax lien and there claimed that the assignment

as collateral security was subordinate. In holding that the assignment to the National Refining Company took priority over the Government's tax claim, the court said:

> "We think it safe to say that one who for a valuable present consideration acquires a property or interest in property, is 'a purchaser' within the meaning of 26 U.S.C.A. Internal Revenue Code, Section 3672."

It cannot be doubted that the execution by the Bonding Company of the bonds in this instance constituted "a valuable present consideration" and it further cannot be doubted that at the time of the assignment as collateral security of the retained percentages by Jacobs to the Bonding Company, the Bonding Company acquired an interest in these retained percentages. However, I do not rest my decision on this ground since in the *Scovil* case the Supreme Court said: "A purchaser within the meaning of Sec. 3672 usually means one who acquires title for a valuable consideration in the manner of vendor and vendee".

In the case of *Knight* v. *Knight*, 71 N.Y. Supp. 2d 357, the Government claimed that its lien for federal taxes was superior to a prior assignment of future wages as collateral security for payments to the taxpayer's divorced wife. The court there held:

> "The Government attempts to avoid the impact of Section 3672 by contending that respondent is not a pledgee. We think that as the assignment of wages made by defendant Knight was as security for, and a means of payment of, the defendant's principal obligation to pay plaintiff $20,000.00, the plaintiff comes within the classification of a pledgee."

This case was subsequently affirmed by the Court of Appeals, 80 N.E. 2d 344, and was not appealed by the Government to the Supreme Court of the United States.

The assignment of retained percentages in the case at bar was made by Jacobs as security for and a means of payment of Jacob's obligation to indemnify the Bonding Company against loss, and it could be said therefore, as was held in the *Knight* case, that the Bonding Company "comes within the classification of a pledgee."

In my opinion, however, the Bonding Company in this instance more nearly comes within the classification of a "mortgagee" under the Texas law, which "should be given considerable weight in determining whether or not" the Bonding Company is a mortgagee. See *U.S.* v. *Gargill*, 218 F.2d 556 at 560. According to 29 Tex. Jur. 786,

> "A mortgage, in the broadest sense of the term is a pledge of property, either real or personal, or of a chose in action, as security for the performance of an obligation."

According to 29 Tex. Jur. 838,

> "A mortgage which purports to secure future debts is not ineffectual or invalid. On the contrary the lien created will be enforced not only in a dispute between the mortgagor and mortgagee but also in a controversy involving the rights of one who claims under the mortgagor."

As was recently stated by the Supreme Court of Iowa in *Evans* v. *Stewart*, 66 N.W. 2d 442 at 449:

> "We feel the requirement that the lienholder be a 'mortgagee' is a requirement of status—that he be in the position of one holding a mortgage".

It is true that the parties to the assignment as collateral security in this instance did not place a label on this transaction as either a mortgage, a pledge or a purchase, but courts do not decide cases on nomenclature; they look to the substance of the transaction; and the substance of the assignment here was to put the Bonding Company in the status of either a mortgagee, pledgee or purchaser, and therefore Section 3672 applies.

In *Northern Nat. Bank* v. *Northern Minn. Nat. Bank*, 70 N.W. 2d 118, the Supreme Court of Minnesota held that an assignment as security of retained percentages under a construction contract to a bank which was prior in time to a Federal tax lien, was superior to the claim of the Government, which is precisely the situation here. The Government did not appeal that case to the Supreme Court of the United States.

The distinction between a contract lien and a statutory lien is made clear by comparing the case of *Evans* v. *Stewart*, supra, with the *Scovil* case, supra. In the *Scovil* case, the Supreme Court held that prior to the time it ripened into a final judgment, an incompleted statutory, landlord's lien was inferior to a federal tax lien, since the holder thereof was neither a "mortgagee", "pledgee", "purchaser" nor "judgment creditor". In the *Evans* case, the court held that a written contract landlord's lien contained in the lease was superior to a federal tax lien because it was a "mortgage" within 3672. The Government did not appeal the *Evans* case.

The Government argues that if an attachment or other judicial lien is not sufficiently "choate" or complete "to defeat a subsequent tax lien" then a mortgage to secure future indebtedness should likewise be inferior to a subsequent tax lien. Congress has in effect stated in Sec. 3672 that before an attaching, or other similar statutory lien or, could claim priority over the Government, his claim had to ripen into a final judgment. *U.S.* v. *Security Trust, etc.*, supra. *U.S.* v. *Acri*, supra. No such qualification was placed by Congress on the contractual lien of a "mortgagee". It is the Congress which enacts the law with refence to priorities and not the courts, and I therefore hold that the Bonding Company under its assignment as collateral security, became a "mortgagee" within the meaning of 3672 and was, therefore, not affected by the tax liens which were subsequent in time.

While admitting that "the Government does not claim the status of an innocent purchaser for value", the Government does contend that because the Bonding Company did not record its assignment under the provisions of Article 260-1, R.C.S. of Texas, said assignment is therefore inferior to the claim of the Government. In Texas, the recording of an assignment adds nothing to the validity thereof as between the parties. (9 Tex. Jur. 97).

As I see it, the Government is seeking to read into Section 6372 provisions which Congress has not seen fit to insert therein and the Government would have this court construe such section to read:

> "Such lien shall not be valid as against any mortgagee *whose mortgage is due at a certain time and in a cer-*

tain amount and which mortgage has been duly recorded in accordance with law."

Had Congress seen fit to make such a requirement it could have done so, but I decline to read these words into the statute, and on this point I concur in the opinion of Judge Wyche in the case of *U.S.* v. *Anders Contracting Company*, 111 F.Supp. 700, where the Government made identically this same contention, was overruled, and did not appeal.

There remains for consideration the question as to whether or not Ball is entitled to any interpleader's fee in this case. The Bonding Company has raised no objection to awarding such fee and in fact has presented cogent arguments as to why such fee should be allowed. The Government, on the other hand, contends that under the case of *U.S.* v. *Liverpool, etc.*, supra, the interpleader is not entitled to his costs. There can be no question as to the status of Ball in this matter. Ball was an innocent stakeholder confronted with conflicting claims to a fund which was in his hands, and he adopted the proper course of employing attorneys and tendering this money into court. As was said by the Supreme Court in its opinion therein, the *Liverpool* case had to do solely with a garnishee's fee under Rule 677 of the Texas Rules of Civil Procedure and did not purport to deal with an Interpleader action under Texas Rule 43 or Rule 22 of the Federal Rules of Civil Procedure, and it is therefore not controlling. On the other hand, the case of *U.S.* v. *Ullman*, 115 F.Supp. 211, is directly in point, and I adopt the reasoning of the court in that case and hold that Ball is entitled to his interpleader's fee in this case, and the remainder of the interpleaded fund, less costs, should be awarded to the Bonding Company.

The attorneys for the Bonding Company are directed to submit a judgment not inconsistent with this Memorandum.

Done on this 29th day of March, A.D. 1956.

(s) Ben H. Rice, Jr.
Chief Judge,
United States District Court,
Western District of Texas.

Filed: April 17, 1956.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—April 17, 1956

FINDINGS OF FACT

1. On June 26, 1951, R. F. Ball Construction Company, Inc. (hereinafter referred to as Ball) entered into a contract with the Housing Authority of the City of San Antonio, Texas, for the construction of Housing Project TEX 6-10.

2. On July 17, 1951, Ball subcontracted the painting and decorating, taping and floating of sheetrock and waterproofing of masonry units on the Housing Project to Marcus M. Jacobs and Henry Lesky, d/b/a Marcus M. Jacobs Co.

3. As a part of the subcontract, Jacobs and Lesky agreed:

> * * * to furnish and pay for all labor, material, tools, equipment, compensation insurance and public liability and property damage insurance (carried in responsible companies and in limits satisfactory to R. F. Ball Construction Company, Inc.), also keep records and make payments on all Federal and/or State Payroll Taxes and/or deductions, together with all other incidentals necessary to complete in a good and workmanlike manner (the subcontracted work) * * *

4. On July 21, 1951, Jacobs and Lesky applied to United Pacific Insurance Company for a faithful performance bond, payable to Ball, in the penal sum of $229,029. The application contained the following clause:

> the undersigned does by these presents assign, transfer and convey to United Pacific Insurance Company, the Company, as of this date, as collateral security for the full performance of the covenants and agreements herein contained and the payment of any other indebtedness or liability of the undersigned to the Company, whether heretofore or hereafter incurred the following:
>
> * * * * * * * *
>
> (d) All right, title and interest of the undersigned in and to and all percentages retained by the Obligee under said contract, and any and all estimates, payments, extras, final payments, and other sums that

. . . . may be due or may thereafter become due under said contract to or on behalf of the undersigned.

5. On July 23, 1951, Jacobs and Lesky (as principals) and United Pecific (as surety) executed a bond in the amount of $229,029, with Ball as obligee, conditioned upon the faithful performance of the Housing Project subcontract "according to its terms, covenants, and conditions".

6. Under the terms of the subcontract, Ball was to retain 10% of the value of the completed work at all times until Ball's work had been accepted by the Housing Authority, at which time the 10% retained fund would be paid to Jacobs and Lesky.

7. On October 1, 1951, Jacobs and Lesky incorporated their business under the name of Marcus M. Jacobs Company, Inc. and the corporation succeeded to all of the partnership's rights in the Housing Project subcontract. Jacobs' and Lesky's contractual obligations under the application for the performance bond were binding upon their successors and assigns, which includes the corporation.

8. On April 4, 1952, Marcus M. Jacobs Company, Inc. applied to United Pacific Insurance Company for a bond in the amount of $35,591 payable to the Darby and Perkins Construction Companies covering a subcontract in Louisville, Kentucky. In this application, the corporation agreed to indemnify United Pacific against all loss (including expenses and attorneys' fees) which might be incurred as a result of writing the bond.

9. Pursuant to the application, United Pacific (as surety) and the corporation (as principal) executed a bond and, between December of 1953 and March of 1954, United Pacific, as surety under the bond, was required to make payments totaling $12,971.88.

10. On April 30, 1953, the Housing Authority accepted Ball's work and, pursuant to the subcontract, $13,228.55 (representing the 10% retained by Ball) became due and owing to Marcus Jacobs Company, Inc.

11. The following table sets forth the pertinent information with respect to Marcus Jacobs Company, Inc.'s tax liabilities to the United States:

Kind of Tax	Taxable Period	Date Assessment List Received by District Director
W-H	4 Q. '52	3/16/53
FUTA	1952	5/14/53
FICA	1 Q. '53	5/15/53

Date Notice of Tax Liens Filed	Outstanding Balance
6/ 9/53	$ 6,343.24
9/ 5/53	1,012.47
5/18/53	9,655.14
	$17,010.85

12. On July 13, 1953, Herweck Company, Inc. notified United Pacific, the Housing Authority, and Ball that it had a claim against Marcus Jacobs Company, Inc. for $981.83 as a result of paint and other materials furnished in connection with the performance of the subcontract.

13. On September 18, 1953, S. H. Kottwitz & Company notified Ball and United Pacific that it had a claim against Marcus Jacobs Company, Inc. for unpaid insurance premiums in the amount of $2,431.05.

14. On May 24, 1954, Ball commenced this action as an interpleader suit, tendering the $13,228.55 which it owed to Marcus Jacobs Co., Inc. into the registry of the District Court of Bexar County, Texas, asking interpleader's attorneys' fees and costs, to be paid out of the fund. It is agreed between the parties that, if Ball is entitled to receive an interpleader's attorneys' fee as a matter of law, a reasonable sum would be $500.

15. The following parties were named defendants:

Marcus M. Jacobs and Henry Lesky, individually and as partners, d/b/a Marcus M. Jacobs Co.
Marcus M. Jacobs Co., Inc.
United Pacific Insurance Company
Herweck Company, Inc.
Otto Dukes, d/b/a Otto Dukes Machinery Company

Floor Maintenance Bureau Products Company (a corporation)
J. T. Dulaney and R. T. Dulaney, partners, d/b/a Dulaney Service Company
S. H. Kottwitz & Company
The United States of America
R. L. Phinney, District Director of Internal Revenue.

16. The United States of America removed the case to this Court on June 15, 1954, and the $13,228.55 deposited by Ball in the registry of the State Court is now in the registry of this Court.

17. R. L. Phinney, District Director of Internal Revenue, was dismissed as a party.

18. On October 21, 1954, default judgments were entered against the following parties:

Marcus M. Jacobs and Henry Lesky, individually and as partners, d/b/a Marcus M. Jacobs Co.
Marcus Jacobs Co., Inc.
Otto Dukes, d/b/a Otto Dukes Machinery Company
Floor Maintenance Bureau Products Company (a corporation)
J. T. Dulaney and R. T. Dulaney, partners, d/b/a Dulaney Service Company.

19. The remaining parties (Ball, United Pacific, Herweck, Kottwitz, and the United States) submitted the case on a stipulation of facts.

20. The Court must decide what are the relative priorities of the following creditors with respect to the $13,228.55 now on deposit in the registry of this Court representing the retained fund owed by Ball to Marcus Jacobs Co., Inc. as a result of performance of the subcontract on the TEX 6-10 Housing Project:

(a) The United States of America (claiming under tax liens against all property and rights to property belonging to Marcus Jacobs Co., Inc.).

(b) United Pacific Insurance Company (claiming reimbursement for losses sustained as a result of the Louisville bond as assignee of the retained fund earned by Marcus Jacobs Co., Inc. in performing the TEX 6-10 Housing Project subcontract).

(c) Herweck Company, Inc. (an unpaid material man).

(d) S. H. Kottwitz & Company (holding a claim for unpaid insurance premiums).

(e) R. F. Ball Construction Company, Inc. (claiming interpleader's attorneys' fees).

Conclusions of Law

1. Herweck Company, Inc. has not shown that it has any lien on the retained fund in question, as such. Therefore, the claim of Herweck Company, Inc. will be considered an unsecured claim so far as this fund is concerned.

2. S. H. Kottwitz & Company has not shown that it has any lien on the retained fund in question. Therefore, the claim of S. H. Kottwitz & Company will be considered an unsecured claim so far as this fund is concerned.

3. R. F. Ball Construction Company, Inc., under the usual rule, is entitled to interpleader's attorneys' fees out of the fund in question and the parties have stipulated that a reasonable fee in this case is $500. Ball's right to this fee is superior to the tax liens asserted by the United States and to the claim of United Pacific Insurance Company and, therefore, Ball is entitled to receive $500 out of the $13,228.55 now on deposit in the registry of the Court.

4. As between the tax liens asserted by the United States and the assignment claimed by United Pacific Insurance Company, the assignment gave United Pacific an interest in the retained fund which is superior to the Government's tax liens. United Pacific's claim totals $12,971.88 plus expenses and attorneys' fees in connection with the loss sustained under the Louisville bond. United Pacific is therefore entitled to receive the balance of the $13,228.55 on deposit in the registry of the Court after the payment of $500 to Ball and costs.

Done at the request of the government on this 14th day of April, 1956.

(s) Ben H. Rice, Jr.
Chief Judge,
United States District Court,
Western District of Texas.

Filed: April 17, 1956.

IN UNITED STATES DISTRICT COURT

Final Judgment—April 17, 1956

[Title omitted]

On the 17th day of April, 1956, the above case having heretofore been taken under advisement by the court, and the court having rendered his opinion herein in favor of R. F. Ball Construction Company and United Pacific Insurance Company, the following final judgment is rendered in this cause:

The default judgments heretofore rendered against Otto Dukes, d/b/a Otto Dukes Machinery Company, Floor Maintenance Bureau Products Company (a corporation), J. T. Dulaney and R. T. Dulaney, partners, d/b/a Dulaney Service Company, are hereby made final.

Judgment is here rendered against S. H. Kottwitz & Company and Herweck Company, Inc.

Judgment is here rendered in favor of R. F. Ball Construction Company in the sum of $500.00 as its attorney's fees, and the Clerk of the court is directed to pay said sum of $500.00 out of the funds in the registry of this court direct to R. F. Ball Construction Company.

The Clerk is likewise directed to reimburse himself for all costs of suit herein.

The remainder of the funds in the hands of the Clerk being less than the amount of the claim of the United Pacific Insurance Company, the Clerk is directed to pay the remainder of the funds involved in this suit which are in the registry of the court direct to United Pacific Insurance Company.

It is the further order of this court that the United States take nothing by this suit.

DONE AND ORDERED ENTERED on this, the 17th day of April, 1956.

(s) BEN H. RICE, JR.
Judge.

Entered: Civil Order Book, Vol. No. 7, Page 365.

Filed: April 17, 1956.

IN UNITED STATES DISTRICT COURT

Notice of Appeal to Court of Appeals Under Rule 73(b)—June 15, 1956

Notice is hereby given that defendant in the above entitled and numbered cause hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on April 17, 1956.

(s) RUSSELL B. WINE,
United States Attorney
Western District of Texas.

Filed: June 15, 1956.

IN UNITED STATES DISTRICT COURT

Statement of Points to Be Relied Upon on Appeal—July 12, 1956

Pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, the United States of America, appellant, hereby makes the following statement of the points upon which it intends to rely on appeal:

(1) The Court erred in concluding that R. F. Ball Construction Company, Inc., was entitled to receive an interpleader's attorneys' fee out of the $13,228.55 on deposit in the registry of the Court in preference to the claim of the United States to that fund in its entirety;

(2) The Court erred in concluding that United Pacific Insurance Company's assignment gave United Pacific an interest in the $13,228.55 retained fund which is superior to the Government's tax liens;

(3) The Court erred in ordering the payment of $500 on R. F. Ball Construction Company, Inc., out of the $13,228.55 on deposit in the registry of the Court and in ordering the balance of that fund, less costs of suit, to be paid to United Pacific Insurance Company;

(4) The Court erred in ordering that the United States take nothing in this suit.

(s) RUSSELL B. WINE,
United States Attorney

Dated: July 12, 1956.
Filed: July 12, 1956.

IN UNITED STATES DISTRICT COURT

Designation of Contents of Record on Appeal—

July 12, 1956

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the United States of America, appellant, hereby designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal:

(1) Stipulation of Facts filed January 14, 1955;

(2) Supplemental Stipulation of Facts filed January 17, 1955;

(3) Memorandum Opinion entered February 6, 1956;

(4) Memorandum of Decision entered March 29, 1956;

(5) Findings of Fact and Conclusions of Law entered April 14, 1956;

(6) Judgment entered April 17, 1956;

(7) Notice of Appeal filed by appellant on June 15, 1956;

(8) Appellant's Statement of Points to be Relied Upon On Appeal.

(s) RUSSELL B. WINE,
United States Attorney

Dated: July 12, 1956.

Filed: July 12, 1956.

Clerk's Certificate to foregoing Transcript (omitted in printing).

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argument and Submission—November 20, 1956 (omitted in printing).

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16276

UNITED STATES OF AMERICA,

Appellant,

VERSUS

R. F. BALL CONSTRUCTION COMPANY, INC.,
and
UNITED PACIFIC INSURANCE COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Opinion—December 26, 1956

Before CAMERON, JONES and BROWN, Circuit Judges.

Per Curiam: The facts of this case are well recited and the controlling principles of law are well stated in the opinion of Judge Rice, *R. F. Ball Construction Company* v. *Jacobs*, 140 F. Supp. 60. For the reasons there set forth the judgment appealed from is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

No. 16276

UNITED STATES OF AMERICA,

VERSUS

R. F. BALL CONSTRUCTION COMPANY, INC., and UNITED PACIFIC INSURANCE COMPANY.

Judgment—December 26, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Clerk's Certificate to foregoing Transcript (omitted in printing).

SUPREME COURT OF THE UNITED STATES

[Title omitted]

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 5th, 1957.

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 21st day of March, 1957.

SUPREME COURT OF THE UNITED STATES

Order Allowing Certiorari—Filed May 13, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957—439304/P.O. 180